APPEAL NO. 162121
FILED DECEMBER 7, 2016

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on July 14, 2016, with the record closing on September 14, 2016, in (city), Texas, with (hearing officer) presiding as hearing officer. We note that in her decision, the hearing officer incorrectly states that the CCH was held on June 13, 2016. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of (date of injury), does not extend to a disc herniation at L5-S1 abutting the thecal sac and traversing S1 nerve root sleeve or to lumbar radiculopathy; (2) the appellant (claimant) reached maximum medical improvement (MMI) on February 4, 2015; (2) the claimant's impairment rating (IR) is zero percent and (3) the claimant did not have disability from February 4, 2015, through the date of the CCH.

The claimant appealed each of the hearing officer's determinations as being contrary to the preponderance of the evidence. The respondent (carrier) responded, urging affirmance of the hearing officer's decision.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on (date of injury), that the carrier has accepted as compensable a lumbar sprain/strain, and that (Dr. D), appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) as the designated doctor to determine MMI and IR, certified that the claimant reached MMI on February 4, 2015, and assigned a five percent IR.

The claimant testified that he was working as a floor hand on an oil rig on (date of injury), when he twisted and injured his low back.

We note that the Evidence Presented section of the decision indicates that five exhibits were offered and admitted by the hearing officer; however, in the audio recording of the CCH the hearing officer is heard to offer and admit only two documents as hearing officer exhibits. The appeal file contains only two items marked as hearing officer exhibits, those being Hearing Officer Exhibit No.1, the Benefit Review Conference Report, and Hearing Officer Exhibit No. 2, the Division required carrier information form. We note further that the appeal file contains the following additional documents: (1) letter of clarification (LOC) dated July 25, 2016, from the hearing officer to Dr. D; (2) Dr. D's August 1, 2016, response to the LOC dated July 25, 2016; (3) a

copy of the Claimant's Exhibit No. 19, pages 1-4, an electrodiagnostic consultation report dated October 8, 2015; and (4) a copy of the Claimant's Exhibit No. 7, pages 1-5, an electrodiagnostic testing report dated December 9, 2014, but we are unable to ascertain whether these items, or any of them, were admitted as hearing officer exhibits subsequent to the CCH.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of (date of injury), does not extend to a disc herniation at L5-S1 abutting the thecal sac and traversing S1 nerve root sleeve or to lumbar radiculopathy is supported by sufficient evidence and is affirmed.

DISABILITY

The hearing officer's determination that the claimant did not have disability from February 4, 2015, through the date of the CCH is supported by sufficient evidence and is affirmed.

MMI/IR

Section 401.011(30)(A) defines MMI as "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Division shall base its determination of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary. Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) provides that the assignment of an IR for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination.

The hearing officer based her decision that the claimant attained MMI on February 4, 2015, with a zero percent IR on an amended Report of Medical Evaluation (DWC-69) which she indicates rates only the claimant's lumbar sprain/strain and was provided by Dr. D in response to a second request for clarification. A review of the appeal file; however, reveals that there is no DWC-69 or narrative report in evidence

from Dr. D or any other doctor certifying MMI on February 4, 2015, and assigning an IR of zero percent.

The only certifications of MMI/IR in evidence in this case are the August 14, 2015, certification from Dr. D of not at MMI and the January 15, 2016, certification from Dr. D finding MMI on February 4, 2015, and assigning an IR of five percent. Neither of Dr. D's certifications can be adopted as each considers conditions not determined by the hearing officer to be part of the compensable injury.

Since there is no certification in evidence that can be adopted, we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

SUMMARY

We affirm the hearing officer's determination that the compensable injury of (date of injury), does not extend to a disc herniation at L5-S1 abutting the thecal sac and traversing S1 nerve root sleeve or to lumbar radiculopathy.

We affirm the hearing officer's determination that the claimant did not have disability from February 4, 2015, through the date of the CCH.

We reverse the hearing officer's determination that the claimant reached MMI on February 4, 2015, with an IR of zero percent and remand the issues of MMI/IR to the hearing officer.

REMAND INSTRUCTIONS

Dr. D is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. D has filed a DWC-69 and narrative report certifying that the claimant reached MMI on February 4, 2015, and assigning an IR of zero percent pursuant to a second request for clarification subsequent to the CCH on July 14, 2016. If so, the hearing officer is to admit such DWC-69 and narrative report as a hearing officer exhibit. The parties are to be provided with Dr. D's MMI/IR certification so admitted as a hearing officer's exhibit pursuant to this remand and are to be allowed an opportunity to respond. The hearing officer is then to make a determination on MMI/IR consistent with the evidence and this decision.

In the event the hearing officer determines that Dr. D has not filed a DWC-69 and narrative report certifying that the claimant reached MMI on February 4, 2015, and assigning an IR of 0% pursuant to a second request for clarification subsequent to the CCH on July 14, 2016, then and in that event, the hearing officer is to determine if Dr. D is still qualified and available to serve as designated doctor. If Dr. D is still qualified and

available to serve as the designated doctor, the hearing officer is to request that Dr. D examine the claimant and assign an IR as of the date of MMI in accordance with Rule 130.1(c)(3) and the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000). The hearing officer should further instruct the designated doctor that the compensable injury is limited to a lumbar sprain/strain.

If Dr. D is no longer qualified or is not available to serve as the designated doctor, then another designated doctor is to be appointed to determine the claimant's MMI/IR for the (date of injury), compensable injury.

The parties are to be provided with the designated doctor's new MMI/IR certification, if any, and are to be allowed an opportunity to respond. The hearing officer is then to make a determination on MMI/IR consistent with the evidence and this decision.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **AMERICAN ZURICH INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701.

K. Eugene Kraft
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge